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No. _____

In the Supreme Court of the United States
October Term, 1995

The Sherwin-Williams Company,
Cross-Petitioner,

v.

Central States, Southeast and
Southwest Areas Pension Fund,
Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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62pp

QUESTION PRESENTED

A former subsidiary of Respondent and Cross-Petitioner, The Sherwin-Williams Company ("Sherwin-Williams") ceased making contributions on behalf of its employees to Petitioner and Cross-Respondent, Central States, Southeast and Southwest Areas Pension Fund ("Central States"). However, at least one other of Sherwin-Williams' subsidiaries continued making contributions to Central States. As a result of such cessation of contributions, Central States assessed Sherwin-Williams for *complete* withdrawal liability, pursuant to the withdrawal liability provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381-1405. Sherwin-Williams disputed the assessment through statutorily mandated arbitration, and an arbitrator found that the assessment was improper. Central States filed a complaint in the district court below, attempting to have the arbitrator's decision modified or vacated; and Sherwin-Williams filed a complaint to enforce the arbitrator's decision. The district court enforced the arbitrator's decision. Still refusing to accept the arbitrator's decision, Central States appealed to the Seventh Circuit, which affirmed that the assessment was improper. At each stage, Sherwin-Williams sought attorneys' fees, but the arbitrator and the courts denied the requests.

Thus, Sherwin-Williams petitions this court for a writ of certiorari to address the following issue:

What is the appropriate standard that a court is to apply in determining whether an employer is entitled to attorneys' fees incurred as a result of a multiemployer pension fund's improper assessment of withdrawal liability and refusal to accept an arbitrator's decision that the fund's assessment of liability was contrary to law?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent and Cross-Petitioner, The Sherwin-Williams Company, states that it has no parent company and its subsidiaries (other than wholly-owned subsidiaries) are:

John's Color Wheel, Inc. (60% subsidiary)
Kaney Paints, Inc. (60% subsidiary)
Heritage Paint and Decorating, Inc. (60% subsidiary)
American Standox, Inc. (50% ownership)

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OPINIONS BELOW

The decision of the court below is reported at 71 F.3d 1338 and is reproduced in Appendix A to the Petition for Writ of Certiorari, pp. 1a-11a. The decision of the district court is reported at 879 F. Supp. 867 and is reproduced in Appendix B to the Petition for Writ of Certiorari, pp. 12a-32a. The decision of the arbitrator in Case No. 51-621-0009-91 (American Arbitration Association, Chicago Regional Office) (Sept. 12, 1994) is reproduced in Appendix C to the Petition for Writ of Certiorari, pp. 33a-44a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 14, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 12.5. The petition for writ of certiorari, in connection with which this cross-petition is filed, was docketed on March 13, 1996.

STATUTES AND REGULATIONS INVOLVED

The texts of the following relevant statutes are set forth in the Appendix:

28 U.S.C. §1254(1)
29 U.S.C. §1001a(c)(1)
29 U.S.C. §1001a(c)(2)
29 U.S.C. §1132(g)
29 U.S.C. §1383(a)
29 U.S.C. §1401(b)(2)
29 U.S.C. §1451(d)
29 U.S.C. §1451(e)

STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§1381-1405.

From 1987 until 1990, Respondent and Cross-Petitioner, The Sherwin-Williams Company ("Sherwin-Williams") owned three companies (Lyons Transportation Lines, Inc., Terminal Garage and Dupli-Color Products Co.) that contributed to Petitioner and Cross-Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States"), a multiemployer pension plan within the meaning of 29 U.S.C. §1002(37) and §1301(a)(3). On or about June 1, 1990, Sherwin-Williams sold the stock of Lyons Transportation Lines, Inc. ("Lyons") to JRC Acquisition Corp. ("JRC") for bona fide business reasons. After the sale, Lyons began to encounter numerous problems, which ultimately resulted in its demise. On October 12, 1990, Lyons ceased making contributions to Central States; and on October 19, 1990, Lyons and JRC filed Chapter 11 bankruptcy proceedings.

Pension contributions for the two covered employees at the Terminal Garage were made for most of 1990. However, by correspondence dated November 27, 1990, almost six months after Sherwin-Williams' sale of Lyons, subsequent to Lyons' Chapter 11 filing and cessation of contributions, counsel for the local union representing employees of Terminal Garage notified the National Labor Relations Board that it was disclaiming interest in serving as the collective-bargaining representative of the two union drivers employed by Terminal Garage.

Thereafter, Terminal Garage ceased making contributions to Central States. The other company, Dupli-Color, is still owned by Sherwin-Williams and still contributes to Central States.

By correspondence dated January 16, 1991, Central States assessed Sherwin-Williams for a complete withdrawal of Lyons. Central States also informed Sherwin-Williams that the demand applied to all members of any commonly controlled group of trades or businesses which included Lyons. Thus, despite the fact that Dupli-Color continued to contribute to Central States, Sherwin-Williams paid a total of $1,988,989.62 to Central States pursuant to its assessment.

By letter dated March 1, 1991, and pursuant to 29 U.S.C. §1399(b)(2), Sherwin-Williams requested Central States to review the assessment, in part because a complete withdrawal could not have occurred while other members of the Sherwin-Williams controlled group continued to contribute to Central States. Central States did not timely respond to Sherwin-Williams, and on August 27, 1991, Sherwin-Williams exercised its option under 29 U.S.C. §1401(a) to request arbitration of the assessment. Five months later, Central States informed Sherwin-Williams that the request for review was denied. By letter dated April 21, 1993 to Sherwin-Williams, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $1,327,077.44 attributable to a 1990 partial withdrawal due to cessation of Terminal Garage's contributions, which computation included the contribution history of Lyons and in this regard was duplicative of the first assessment.

By letter dated April 20, 1995, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $336,374.61 due to a 70% contribution decline pursuant to 29 U.S.C. §1385(a)(1). This assessment again took into consideration the contribution history of Lyons and provided a partial credit relating to Central State's second assessment.

At the arbitration hearing, Sherwin-Williams argued that 1) it could not be liable for a *complete* withdrawal because other members of its controlled group continued to contribute to Central States, and 2) it was entitled to recover attorneys' fees and costs pursuant to 29 U.S.C. §1401(a)(2) and 29 C.F.R. §2641.9(c). On September 12, 1994, the arbitrator held that under no circumstances could Sherwin-Williams be liable for a complete withdrawal of Lyons since other members of the Sherwin-Williams controlled group continued to contribute to Central States. Further, the arbitrator determined that each party would be responsible for its own attorneys' fees and costs and for half of the arbitrator's fee.

Central States, however, did not accept the arbitrator's decision which required Central States to return to Sherwin-Williams the nearly $2 million assessment which it had collected. On October 7, 1994, Central States filed a complaint to modify or vacate the arbitrator's award. On the same date, Sherwin-Williams filed a complaint to enforce the arbitrator's decision to return the assessment monies to Sherwin-Williams and to modify the decision regarding attorneys' fees. Sherwin-Williams also sought recovery of the attorneys' fees incurred as a result of Central States' refusal to accept the arbitrator's award.

On March 15, 1995, the United States District Court for the Northern District of Illinois held that Sherwin-Williams was not liable for a complete withdrawal of Lyons. In addition, the court held that Sherwin-Williams was not entitled to attorneys' fees and costs incurred in connection with either the arbitration or the proceedings before the district court.

Once again, Central States refused to accept a decision which required it to return the assessment monies, and it appealed the district court's decision to the Seventh Circuit. Faced with another round of legal battles, Sherwin-Williams cross-appealed the aspect of the decision denying attorneys' fees and costs. Sherwin-Williams also sought the attorneys' fees and costs incurred as a result of the appeal. The Seventh Circuit affirmed the decision of the district court as to the merits and attorneys' fees issues, but did not expressly rule on Sherwin-Williams' request for attorneys' fees incurred in connection with the Seventh Circuit appeal.

On March 13, 1996, five years after it began collecting its improper assessment, Central States filed a petition for a writ of certiorari in yet another attempt to avoid the arbitrator's decision. In response, Sherwin-Williams files a conditional cross-petition for writ of certiorari, asking this Court to review the lower courts' decisions denying Sherwin-Williams the attorneys' fees and costs which it has incurred in connection with the proceedings before the district court and the Seventh Circuit. Sherwin-Williams is not requesting this Court to review the decisions denying Sherwin-Williams the attorneys' fees and costs which it incurred in connection with the arbitration.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In deciding whether to award attorneys' fees to employers that prevail in multiemployer pension plan withdrawal liability actions, the circuit courts have developed three different and conflicting standards. The most widely accepted standard, adopted by the Second, Sixth and Ninth Circuits, involves an analysis of five factors. The Third Circuit awards attorneys' fees to a prevailing employer in a MPPAA suit only if the claim against the employer was frivolous, unreasonable, or without foundation. The Seventh Circuit applies another unique standard and awards attorneys' fees only if the position of the losing party was not "substantially justified." This Court should resolve the conflict that exists among the circuits.

In part, Congress enacted ERISA for the purpose of creating a uniform federal law regulating employee pension funds. By applying a standard unlike that applied by any other circuit court, the Seventh Circuit thwarted Congress' intent to promote the growth and stability of multiemployer pension funds by helping employers, administrators, fiduciaries and participants predict the legality and impact of proposed actions without the necessity of reference to varying standards. The decision below, therefore, harms not only Sherwin-Williams but also the very system of laws Congress created for the benefit of all parties involved with employee pension funds. This Court should address this important inconsistency in the federal law.

Finally, although the "substantially justified" standard is well-established in the Seventh Circuit, this Court

should reverse that precedent and require the Seventh Circuit to follow the five-factor analysis used in all but one of the other circuits that have addressed the issue. The five factor analysis offers courts the flexibility necessary to exercise discretion consistent with fostering the goals of ERISA, in general, and MPPAA, in particular. The Seventh Circuit's stream-lined approach is unduly restrictive and fails to accommodate all of the ERISA and MPPAA concerns. It does not address issues of deterrence or even benefit to pension fund participants.

Application of the five-factor standard would militate in favor of awarding attorneys' fees to Sherwin-Williams. The use of the five factor standard, a reasonable and predictable approach to awarding attorneys' fees, will deter a multiemployer fund from using the power of MPPAA to unduly harass or burden employers with speculative or bad faith litigation. Furthermore, the integrity of the MPPAA mandated arbitration process will be protected by ensuring the cost and time efficient resolution of disputes between employers and pension funds.

Even under the Seventh Circuit's own standard, however, the courts below reached erroneous decisions. They held that because Central States raised "novel issues", Sherwin-Williams was not entitled to an award of attorneys' fees. Yet, they ignored Central States' persistent efforts to avoid the arbitrator's decision, and worse, they ignored the fact that the "novel issues" were completely without merit.

This Court should take the opportunity presented by this case to vindicate the rights of Sherwin-Williams and

all other similar prevailing ERISA parties and rectify the inconsistencies which currently exist in the federal common law standards of awarding attorneys' fees under MPPAA. More to the point, this Court should grant the writ because the decision of the court below was wrong.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with All Other Circuits That Have Decided the Same Issue

In the context of a MPPAA lawsuit, Congress vested the courts with the authority to "award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorneys' fees, to the prevailing party." 29 U.S.C. §1451(e). Without guidance from Congress or the Pension Benefit Guaranty Corp., district courts and circuit courts have articulated differing standards to guide them when they exercise their fees-and-costs-awarding discretion. The Seventh Circuit applied a unique standard and erroneously determined that Sherwin-Williams was not entitled to attorneys' fees because Central States' meritless position was "substantially justified." Under a five-factor test applied in a majority of the circuits which have addressed this issue, however, Sherwin-Williams would be entitled to the attorneys' fees incurred in this action.

First announced in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), the five factors are:

(1) The degree of the offending parties' culpability or bad faith;

(2) The degree or ability of the offending parties to personally satisfy an award of attorney's fees;

(3) Whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances;

(4) The amount of benefit conferred on members of the pension plan as a whole; and

(5) The relative merits of the parties' position.

Id. at 465. Although *Eaves* involved an award of attorneys' fees pursuant to 29 U.S.C. §1132(g), its test has been used by three of the five circuits that have decided the appropriate standard to follow in determining whether to award attorneys' fees under 29 U.S.C. §1451(e).[1] *See, e.g., Anita Founds. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 187-89 (2d Cir. 1990); *Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760 (6th Cir. 1987); *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension*

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[1]The five factor test also has been applied by eight of the nine circuits which have decided whether to award attorneys' fees to prevailing defendants pursuant to §1132(g). See, e.g., *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257-59 (1st Cir. 1981); *Monkelis v. Mobay Chem.*, 827 F.2d 935 (3d Cir. 1987); *Hogan v. Kraft Foods, Inc.*, 969 F.2d 142, 146 n. 17 (5th Cir. 1992); *Firestone Tire and Rubber Co. v. Neusser*, 810 F.2d 550, 556-58 (6th Cir. 1987); *Hoover v. Armco, Inc.*, 915 F.2d 355, 357-58 (8th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 25 F.3d 743, 748-50 (9th Cir. 1994); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 108-09 (10th Cir. 1983); *Evans v. Bexley*, 750 F.2d 1498, 1500 (11th Cir. 1985).

Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Although the Seventh Circuit equates the standards of §1132(g) with §1451(e), *Rootberg v. Central States Southeast & Southwest Areas Pension Fund*, 856 F.2d 796 (7th Cir. 1988), the Seventh Circuit's "substantially justified" standard clearly differs from the *Eaves* five factor test. The court below held that "the loser must pay if its position lacked a substantial basis." *Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1346 (7th Cir. 1995). In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984), the Seventh Circuit explained that a substantially justified position is "more than merely not frivolous, but less than meritorious." In other words, it "must have a solid though not necessarily correct basis in fact and law. . . ." *McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983).

The substantially-justified standard conflicts with the five-factor analysis applied in other circuits. While the *Bittner* court opined that the two standards were consistent, subsequent decisions concerning the five factor test have acknowledged the conflict.[2] In *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251 (1st Cir. 1986), the First Circuit discussed the applicability of both *Eaves* and *Bittner*. The court held:

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[2]*See* David E. Gordon and Robert N. Eccless, *ERISA Attorney's Fees: an Unpredictable Situation*, 6 No. 10 Inside Litig. 17, October 1992.

> We decline to follow the Seventh Circuit approach and agree with the District Court below that the five factor standard is the appropriate test for awarding fees pursuant to ERISA, 29 U.S.C. §1132(g)(1) with respect to both prevailing plaintiffs and prevailing defendants.

Id. at 258. In the following year, the Seventh Circuit responded to *Gray*.

> Our analysis was rejected by the First Circuit in *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257-60 (1st Cir. 1986), which decided to adhere to the conventional five-factor test, even though that test is oriented toward the case where a prevailing plaintiff rather than a prevailing defendant is asking for fees. *See also Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 557-58 (6th Cir. 1987). Speaking with great respect, we find nothing in the First Circuit's opinion that persuades us to withdraw from *Bittner*, and we shall therefore adhere to it. We are not as enamored of multi-factored balancing tests as some of our colleagues in other circuits.

Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048, 1054 (7th Cir. 1987) (citation omitted).

Exacerbating the confusion which exists among the circuits, the Third Circuit offers yet another standard pursuant to which attorneys' fees are awarded to prevailing MPPAA employers. In *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 799 F.2d 45 (3d Cir. 1986), the court adopted a test established for prevailing

defendants in civil rights actions. The court held "that a prevailing employer is to be awarded attorney's fees under MPPAA only if the underlying claim against it was frivolous, unreasonable or without foundation." *Id.* at 46. Further, the court expressly rejected application of the five-factor test. *Id.* at 50 n. 7. To complete the disagreement among the circuits, the Seventh Circuit expressly rejected the Third Circuit's standard. *Rootberg*, 856 F.2d at 798.

All but three of the circuit courts have articulated a standard for exercising the discretion to award attorneys' fees either to prevailing defendants under §1132(g) or prevailing employers under §1451(e). Their positions are clear, and they conflict. Even among courts that agree upon using the five-factor test, "[t]he need for further evolution of the law of fee shifting under ERISA has been implicitly recognized . . . ." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991) *citing Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). This case presents an opportunity to define the federal common law with which the circuits have struggled to resolve their conflict. This Court should grant the writ.

II. The Need for A Uniform Standard Is Important

The standard to be applied in awarding attorney's fees for prevailing employers under MPPAA is critical 1) to a uniform application of the MPPAA provisions of ERISA, 2) as a control on the power given to a multiemployer plan under MPPAA, and 3) to ensure that the purposes for requiring a MPPAA arbitration are satisifed. Apart from the disagreement among the circuits on this issue,

the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers. *See Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1513 (9th Cir. 1983), *rev'd on other grounds, sub nom., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984); *see also Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1052 (N.D. Ill. 1982) ("withdrawal liability can be harsh and onerous . . . ."), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Any uncertainty in the process tends to deter employers from entering multiemployer plans, an outcome directly contrary to the intention of Congress in enacting MPPAA. *See* 29 U.S.C. §1001a(c)(2).

Uniformity is among the most fundamental goals of ERISA. It reduces the burden of multiemployer pension plan operations, and ultimately inures to the benefit of the millions of plan participants. This Court has recognized that fact in the context of addressing the issue of ERISA's preemption of state law:

> A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co. v. Coyne, 482 U.S 1, 11 (1987).

The *Fort Halifax* reasoning also applies to the issue of awarding attorneys' fees to prevailing MPPAA employers. Although the issue of attorneys' fees under MPPAA does not rise to the same level as the issue of ERISA preemption, nevertheless, the employer's task of forecasting labor expenses and liabilities becomes increasingly difficult when vagaries of multiple standards regarding the award of attorneys' fees are added to the mix. As a result, management comes to the bargaining table with trepidation concerning the issue of pension contributions and its ability to challenge a meritless assessment in a cost efficient manner.

In addition, an inconsistent application of the standards for awarding attorney fees to a prevailing employer also results in an inconsistent approach to the application of MPPAA by funds. In other words, an inconsistent standard allows a fund in one jurisdiction to press an aggressive and illogical interpretation of MPPAA without concern for the litigation expense incurred by the employer in responding, while a fund in another jurisdiction would be much more hesitant to press an unsupportable position beyond the arbitration.

The MPPAA strikes a strong bias in favor of pension funds seeking withdrawal liability from employers. It offers only two potential benefits to employers that are assessed. First, through the mandate of arbitration, MPPAA provides employers and funds alike with a time and cost efficient means of resolving their disputes. Second, through the authorization of awarding attorneys' fees, MPPAA attempts to provide employers with some assurance that funds will not abuse the benefits granted

them under MPPAA by rejecting arbitration awards and unduly pressing litigation.

Unable to predict with any certainty when these protections will be available, employers will assume the worst and reserve for litigation the resources that otherwise might be offered at the bargaining table for the benefit of employees.

Regardless of which attorneys'-fees-awarding standard is correct, the conflict does nothing to facilitate the free flow of interstate commerce or increase participation in multiemployer plans. Yet, these are express purposes for the enactment of the MPPAA. 29 U.S.C. §1001a(c)(1) and (2). A determination on this issue will eliminate substantial uncertainty and should result in a significant conservation of resources by parties in the courts below thereby fostering the goals of Congress.

The conflict among the circuits that exists on this issue should be resolved. It is a question of wide and general concern. Recent government published figures indicate that there are nearly 10 million participants in multiemployer pension plans and more than 3,000 plans. Pension and Welfare Office of Research and Economic Analysis, U.S. Dep't of Labor, Abstract of 1992 Form 5500 No. 5, *Private Pension Plan Bulletin* (Winter 1996). Remedial provisions of ERISA and MPPAA were enacted to ensure vindication of the rights of the participants and contributors to the funds. Certainly, ERISA did not contemplate that employers, participants and fiduciaries in one circuit would have rights different from those in another. Specifically, 29 U.S.C. §1401(b)(2) provides that following issuance of the arbitrator's award, any party may

bring an action in an appropriate United States district court in accordance with 29 U.S.C. §1451(d) to enforce, vacate, or modify the arbitrator's award. 29 U.S.C. §1451(d) provides that such action may be brought in the district where the plan is administered or where a defendant resides or does business. Thus, where either the plan or the employer loses at the arbitration level, it can select that forum otherwise permitted which uses the more restrictive attorneys'-fees-and-costs-awarding standard and thereby reduce its exposure for pressing a questionable position. Alternatively, a prevailing party will be inclined to seek enforcement in that forum which adheres to the more liberal attorneys'-fees-and-costs-awarding standard. The path to forum shopping for attorneys' fees can only be barred by this Court's resolving the conflict among the circuits.

III. The Decision Below Was Wrong

The five-factor test should apply in every circuit, including the Seventh Circuit. If the Seventh Circuit had applied the five-factor test relied upon by the majority of other circuits, a contrary result would have obtained.[3] Nevertheless, even if the Seventh Circuit's "substantially

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[3]Sherwin-Williams never attempted to persuade the Seventh Circuit to adopt the five-factor *Eaves* test. As discussed *supra*, the Seventh Circuit had recently refused to change its position. Without any intervening developments in the law, Sherwin-Williams had no basis upon which to demand that the Seventh Circuit correct its erroneous precedent. Because the precedent was both recent and well-established in the Seventh Circuit, however, it would be "unreasonable" to bar Sherwin-Williams from raising the argument for the first time before this Court. *See United States v. Williams*, 504 U.S. 36, __, 118 L. Ed. 2d 352, 363 (1992).

justified" test is appropriate, Sherwin-Williams is entitled to an award of attorneys' fees under that standard.

A. The Five Factor Test is a Better Standard

The Seventh Circuit derived its novel standard from that used under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d)(1)(A) (repealed October 1, 1984). Significantly, under the EAJA, a prevailing party would only collect attorneys' fees from the United States Government. As the First Circuit recognized, however, "[a] multi-faceted approach is more desirable when fees are to be assessed against parties other than the United States." *Gray*, 792 F.2d at 259.

Awarding attorneys' fees against a private party involves considerations not relevant to the same issue involving the government. For example, perhaps the most important reason to award Sherwin-Williams attorneys' fees is to deter similar conduct by other pension funds. The MPPAA provides plan sponsors with extraordinary power to assess and collect monies for withdrawal liability. Unless an employer, such as Sherwin-Williams, is able to recover the attorneys' fees incurred by being forced to both respond to inappropriate withdrawal liability assessments and to pay monies pending the resolution of the assessment, a plan sponsor, such as Central States, can misuse its MPPAA powers to harass and abuse employers. *See Anita Founds. v. ILGWU Nat'l Retirement Fund*, 902 F.2d at 191. The same consideration of deterrence did not apply to cases involving the United States.

Because awarding attorneys' fees under MPPAA involves additional considerations not present under the

EAJA, the five-factor test is superior to the EAJA and the Seventh Circuit's "substantially justified" standard. The *Bittner* court praised its newly adopted standard, referring to it as "simpler and more definite" than the five-factor test. 728 F.2d at 830. But that is precisely its flaw. It fails to accommodate all the significant factors which must be considered in MPPAA withdrawal liability cases.

In sharp contrast, the five factor test offers the flexibility and clarity necessary to provide "guidance to the district courts in evaluating fee requests . . . and enable meaningful appellate review." *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 206 (D.C. Cir. 1995). The circuits applying this standard uniformly agree that the five "factors are neither exclusive nor quantitative. . . ." *Id.* (citing *Freeman v. Continental Ins. Co.*, 966 F.2d 1116, 1119 (11th Cir. 1993); *Quesinberry v. Life Ins. Co.*, 987 F.2d 1017, 1029 (4th Cir. 1993) (*en banc*); *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980)).[4] Thus, the courts have applied the five factor test with equal consistency in cases involving prevailing plaintiffs and defendants. Given the wide and proper acceptance of the five factor test, this malleable standard should similarly apply to a prevailing employer seeking attorneys' fees under 29 U.S.C. §1451(e).

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[4]*See also* Alan P. Woodruff, *Attorneys' Fees Under ERISA*, 67 Fla. B.J. 24, 26 (August 1993).

B. Sherwin-Williams is Entitled to Attorneys' Fees Based on an Application of the Five Factor Test

If applied in this case, the five factor test leads only to the conclusion that Sherwin-Williams should be awarded attorneys' fees. The first factor in the test -- bad faith or culpability -- need not be satisfied to properly award attorneys' fees. *See, e.g., Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538, 1560 (C.D. Cal. 1988) (citing *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984). Nevertheless, the conduct of Central States does evince bad faith or culpability.

Central States acted in bad faith. Pursuant to 29 U.S.C. §1383(a), a complete withdrawal from a multiemployer plan occurs when an employer:

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

Central States assessed Sherwin-Williams for a complete withdrawal without any evidence to satisfy the plain language of either condition. Indeed, to the contrary, Central States has consistently recognized that after the sale of Lyons by Sherwin-Williams, "Dupli-Color . . . is still owned by Sherwin-Williams and still contributes to Central States." Central States' Petition for Writ of Certiorari, p. 3.

Without any evidence in support of its assessment, Central States "could not have had a good faith reasonable belief that it could prove its ERISA claim" against Sherwin-Williams. *Credit Managers Ass'n v. Kennesaw Life and Accident Ins. Co.*, 25 F.3d 743, 749 (9th Cir. 1994).

Indeed, at the same time that Central States was arguing that 29 U.S.C. §1398 required that the Sherwin-Williams controlled group should be ignored for purposes of determining whether the withdrawal was complete or partial, Central States was taking a contrary position in another litigation, arguing that a sale which it alleged did not satisfy the requirement of 29 U.S.C. §1398, constituted a partial withdrawal with respect to the selling controlled group. *See Santa Fe Pacific Corporation v. Central States, Southeast & Southwest Areas Pension Fund*, No. 92 C 0677, 1992 U.S. Dist. Lexis 15159 (N.D. Ill. October 6, 1992), *rev'd*, 22 F.3d 725 (7th Cir.), *and cert. denied*, 130 L. Ed. 2d 396 (1994).[5] The need for a fund to protect its members by pursuing withdrawal liability does not excuse the fact that Central States caused Sherwin-Williams "to expend unnecessary effort and resources in defending the instant lawsuit." *Farris v. Century Planners, Ltd.*, 858 F. Supp. 150, 154 (D. Kan. 1994).

Central States has now issued *three* withdrawal assessments against Sherwin-Williams, all related to Lyons. Sherwin-Williams has been forced to prepare three separate, voluminous and costly Requests for Review in

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[5]For the convenience of the Court, a copy of the unreported opinion is attached hereto at Appendix A11.

order to adequately preserve its rights. Further, Central States' vexatious assessments forced Sherwin-Williams to seek two separate arbitrations, with the pending possibility of a third, all related to Lyons. If Central States had properly investigated the status of Sherwin-Williams and its controlled group prior to issuing its complete withdrawal assessment, Sherwin-Williams certainly would not have been required to incur the significant expenses incurred in preparing the Request for Review and in seeking arbitration pertaining to the instant case, not to mention its expenses with respect to Central States' subsequent assessments which are still pending[6].

The second factor in the analysis -- ability to pay attorneys' fees -- clearly weighs in favor of awarding the fees. Central States has paid much larger amounts of attorneys' fees than are at issue before this Court. In *Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538 (C.D. Cal. 1988), the district court awarded $1.9 million in attorneys' fees and costs against Central States, which had $8 billion in assets at the time. *Id.* at 1561. Furthermore, just a quick glance at the table of authorities, *supra*, will make clear that the hyper-litigious Central States obviously has substantial resources available for litigation.

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[6]Ultimately, Central States, by its third assessment, has taken that position which Sherwin-Williams had articulated to Central States in the initial Request for Review -- namely, that, at best, the only withdrawal liability that could possibly be assessed against Sherwin-Williams with respect to Lyons was a 70% decline partial withdrawal that could not be determined until after December 31, 1993.

The third factor -- deterrence -- also favors an award of fees. The reasoning of *Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 642 F. Supp. 295 (W.D. Pa. 1986), *aff'd, sub nom., Appeal of Ayo*, 815 F.2d 693 (3d Cir.), *and aff'd, sub nom., Appeal of Campbell*, 815 F.2d 693 (3d Cir.), *and aff'd*, 815 F.2d 697 (3d Cir.), *cert. denied, sub nom., Belak v. United States Steel Corp. Plan for Employee Pension Benefits*, 484 U.S. 847 (1987), fits squarely with the instant facts: The "deterrent effect will be beneficial upon those who contemplate speculative litigation on thinly based grounds, particularly those whose expectations amount to a double recovery." *Id.* at 297. An award of attorneys' fees in this case would discourage other funds "from asserting, and possibly fabricating, claims with no basis in law or fact." *Paddack v. Morris*, 783 F.2d 844, 847 (9th Cir. 1986).

The fourth factor concerns whether a benefit is conferred on members of the pension plan as a whole. This factor, too, suggests that an award of attorneys' fees should be made. The courts have consistently held that a benefit is conferred upon all plan members when an important legal issue is resolved. *See, e.g., Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) (incorporating resolution of important legal issues into the fourth factor); *see also Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987) (applying *Hummel*, in *dicta*, to a MPPAA case). The entitlement to attorneys' fees, in this case, raises an important legal issue which merits an award of fees and costs. *See Cowden v. Montgomery County Soc'y for Cancer Control*, 653 F. Supp. 1072, 1078 (S.D. Ohio 1986). Alternatively, this factor weighs in favor of awarding fees to a defendant where the plaintiff fails to resolve

significant legal issues. *See Credit Managers Ass'n*, 25 F.3d at 748. As explained in Sherwin-Williams' Respondent's Brief in Opposition to the Petition for Certiorari, the position asserted by Central States was contrary to the clear language of MPPAA and in conflict with Congressional intent.[7] Finally, the deterrent effect of awarding attorneys' fees to a defendant that was subjected to such a meritless and speculative claim by Central States, benefits plan members by reducing the future litigation costs of the fund. *See Anita Foundations*, 902 F.2d at 191.

Fifth, the courts below should have awarded attorneys' fees to Sherwin-Williams because it successfully defended a claim that was without merit. The courts below denied Sherwin-Williams' request because they found Central States' position "substantially justified." While that conclusion, if true, might suggest the absence of bad faith on the part of Central States, it does not bar the possibility of culpable conduct nor change the fact that the position was without merit.

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[7]If this Court should disagree and find that the issue raised by Central States was worthy of consideration, the finding would provide even greater support for an award of attorneys' fees to Sherwin-Williams. By prevailing in defense of Central States' allegations, Sherwin-Williams will have obtained a resolution of, what this Court deems, an important legal issue. Prevailing on such a defense favors an award of attorneys' fees. *See Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. at 1561; *Schetter v. Prudential-Bache Sec., Inc.*, 695 F. Supp. 1077, 1083 (E.D. Cal. 1988).

The fifth factor favors an award of attorneys' fees to Sherwin-Williams because Sherwin-Williams' "position on the merits [is] significantly stronger than" Central States'. *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728, 734 (C.D. Cal. 1991). Even in cases where a plaintiff's claim is "not entirely unmeritorious, though ultimately unavailing[, t]his fifth *Hummel* factor also weighs in favor of [the defendant], however slightly." *Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. at 1561. But in this case, Central States failed to prevail on a single claim against Sherwin-Williams. "Therefore, the relative merits of the parties weighs heavily in favor of an award of attorneys' fees in favor of" Sherwin-Williams. *Schetter*, 695 F. Supp. at 1083.

In *Vintilla*, 642 F. Supp. 295, the court awarded attorneys' fees to the prevailing employer because "the continued litigation was highly speculative and . . . represented an attempt to receive the same benefits twice. . . ." *Id.* at 297. Similar facts are before this Court. Like the "double dipping" in *Vintilla*, Central States imposed a second partial withdrawal assessment against Sherwin-Williams at the same time Central States was pursuing the assessment for complete withdrawal. It was only after Sherwin-Williams initiated an action to enjoin Central States from its attempt to double dip, that Central States postponed the attempt to collect twice.

Because Sherwin-Williams should be awarded attorneys' fees under the five factor standard, this Court should grant the writ and correct the error of the court below.

C. The Courts Below Erred in Finding That Central States' Position was Substantially Justified

The foregoing discussion of how Sherwin-Williams' claim for attorneys' fees satisfies the five factor test also casts into stark relief the errors made by the courts below in applying the "substantially justified" standard. An analysis of the five factors yields a conclusion in favor of Sherwin-Williams. In contrast, the "substantially justified" standard "creates a modest presumption . . . in favor of awarding reasonable attorney's fees to the winning party, plaintiff or defendant. . . ." *Bittner*, 728 F.2d at 830. Yet, the courts below still denied an award to Sherwin-Williams.

At its heart, the reasoning of the courts below is that Central States raised complex novel issues. The courts' reasoning is flawed. According to the district court the issue was "not just the cessation of contributions by a subsidiary, but [whether] such a cessation [was] *caused* directly by its parent's action in selling the subsidiary's stock so as to disable the subsidiary financially." (Central States' Petition for Writ of Certiorari, Appendix, p. 32a) (hereinafter "App., p.__")(emphasis added). The circuit court below, however, correctly noted that "the arbitrator ruled against [Central States] without addressing the causation question. . . ." (App., p. 6a). Thus, neither court below had reason to address the allegedly complex novel issue. Instead, this case has been decided on the more straightforward issue of whether a complete withdrawal could occur when other members of the control group continue making contributions. Thus, it is precisely because Central States attempted to thwart Sherwin-Williams' resistance with the use of irrelevant legal

obfuscation that the position of Central States is not substantially justified and warrants an award of attorneys' fees to Sherwin-Williams.

CONCLUSION

For the foregoing reasons, Respondent and Cross-Petitioner Sherwin-Williams urges this Court to grant the Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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